IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MYCHI MACH, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Cause No. 4:15-CV-1951-CAS
	)	
ALLSTATE INSURANCE COMPANY,	)	
	)	
	)	
Defendant.	)	

DEFENDANT'S TRIAL BRIEF

COMES NOW defendant, Allstate Insurance Company (hereinafter "Allstate"), pursuant to this Court's Case Management Order of January 28, 2016, and for its Trial Brief, states as follows:

Brief Statement of Facts

Allstate issued a Landlords Package Policy (hereinafter "Policy") to plaintiffs on their rental dwelling located at 3259 Michigan, St. Louis, Missouri 63118. The Policy had an effective period of October 11, 2014 through October 11, 2015.

On April 13, 2015, plaintiff Mychi Mach called Allstate and reported that a water pipe in the dwelling had frozen and burst, resulting in damage to the home. Ms. Mach further advised that she wanted to pursue a claim under the Policy.

On April 22, 2015, Allstate adjuster Steve Lutterman conducted an inspection of the dwelling. Based on his observations during the inspection, Mr. Lutterman concluded that the loss was not "sudden" as required by the Policy. Mr. Lutterman concluded that the water damage to the dwelling was the result of continuous and repeated seepage and leakage of water over a long period of time, which is an excluded cause of loss under the Policy. Accordingly, Allstate advised plaintiffs that the Policy did not provide coverage for the loss.

On June 15, 2015, Allstate received contact from public adjuster Jerry Kramer on behalf of plaintiffs. Mr. Kramer advised that plaintiffs were disputing Allstate's coverage position, and requested that Allstate give further consideration to the claim. Allstate then agreed to conduct another inspection of the dwelling with Mr. Kramer present.

On June 25, 2015, Allstate adjuster Brent Baker met Mr. Kramer at the dwelling to conduct another inspection. At that time, Mr. Kramer reiterated plaintiffs' initial position that the water damage was caused by a pipe that had frozen and burst. However, Mr. Baker observed obvious evidence of long-term water leaks and water infiltration problems throughout the dwelling which were clearly not the result of a single pipe break. Based on his inspection, Mr. Baker advised Mr. Kramer that Allstate was standing by its original coverage determination.

Mr. Baker also advised Mr. Kramer that, to the extent any of the damage might have been caused by a water pipe which had frozen and burst, the Policy would not provide coverage for such damage unless plaintiffs had taken reasonable steps to maintain heat in the dwelling or shut off the water supply and drain the system. Mr. Baker asked Mr. Kramer to forward any documentation which would establish that plaintiffs took those reasonable steps, and any documentation to establish that the loss was "sudden" as required by the policy. Mr. Kramer and plaintiffs never provided any such documentation.

Accordingly, Allstate stood by its coverage determination. Plaintiffs subsequently filed suit against Allstate on November 23, 2015 in St. Louis County Circuit Court. Allstate timely removed the case to this Court on the basis of diversity jurisdiction.

Law and Argument

The Allstate Policy issued to plaintiffs is an "all-risk" policy. Under an all-risk property insurance policy, recovery will be allowed for all sudden and fortuitous losses, unless the policy contains a specific provision expressly excluding the loss from coverage. *Pakmark v. Liberty Mut. Ins. Co.*, 943 S.W.2d 256 (Mo.App. E.D. 1997); *Bollinger v. Clarks Fork Mut. Ins. Co.*, 485 S.W.3d 803 (Mo.App. W.D. 2016).

The Allstate Policy issued to plaintiffs contains the following provision:

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Losses We Cover Under Coverages A and B:

We will cover sudden and accidental direct physical loss to property described in **Coverage A – Dwelling Protection** and **Coverage B – Other Structures Protection** except as limited or excluded in this policy.

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It should be noted that plaintiffs, in the first instance, have the burden of proving that the loss in question was "sudden", as required by the above referenced policy provision. However, plaintiffs' is limited to the date they discovered the loss. They do not know whether the loss occurred on one day or over a period of time. More importantly, they do not know the cause of the loss. In addition, plaintiffs' retained and non-retained opinion witnesses have not given any opinion to establish that the loss was "sudden", nor have they given any opinion regarding the cause of the claimed damage. As outlined in Allstate's motion in limine, plaintiffs' opinion witnesses should be prohibited from offering any such opinions at trial. In short, plaintiffs cannot meet their initial burden of proving that this was a "sudden" loss.

In addition to plaintiffs' inability to meet their initial burden, Allstate's evidence will establish that there are several exclusions in the Policy which are applicable and preclude coverage for this loss. To the extent Allstate relies upon certain exclusions in the Policy as affirmative coverage defenses, it is Allstate's burden to establish that the exclusions are applicable. *Nichols v. Preferred Risk Group*, 44 S.W.3d 886 (Mo.App. S.D. 2001).

Allstate's evidence will establish that the claimed damage was caused by continuous and repeated seepage and leakage of water over a long period of time, which is an excluded cause of loss under the Policy.

Allstate's evidence will also establish that plaintiffs have always maintained the cause of loss was a water pipe which froze and burst. The dwelling was heated by natural gas. It is undisputed, and a representative of Laclede Gas has confirmed in deposition, that the natural gas service was shut off on February 7, 2015, and there was no gas usage between that date and the end of April, 2015. The weather records establish that the temperatures during the relevant time frame were certainly cold enough to result in frozen/burst pipes. Significantly, Allstate's evidence will show that plaintiffs did not take reasonable steps to maintain heat in the dwelling, or to shut off the water supply and drain the system. Damage caused by water escaping from a frozen/burst water pipe is an excluded cause of loss under the Policy where, as here, the policyholder does not take reasonable steps to maintain heat in the dwelling or shut off the water supply and drain the system.

To the extent plaintiffs attempt to reverse course at trial and argue that the water pipe did not break due to freezing, the only other possible explanation for the break would be mechanical breakdown of the pipe, or rust or other corrosion – also excluded causes of loss under the Policy and also raised by Allstate as affirmative coverage defenses.

Finally, Allstate has also raised a provision in the Policy which excludes coverage for loss caused by mold, fungus, wet rot, dry rot or bacteria. This exclusion applies regardless of whether the mold, fungus, wet rot, dry rot or bacteria arise from any other cause of loss, including water, water damage or discharge, which may otherwise be covered under the Policy. There will be evidence in the case that some of the claimed damage was caused by mold and wet rot, particularly due to plaintiffs' failure to take any steps, following discovery of the loss, to protect the property from further loss and damage (which is a breach of a condition precedent to coverage in the Policy). Allstate has also raised plaintiffs' breach of this condition precedent as an affirmative coverage defense.

Conclusion

WHEREFORE, Allstate prays that this Court enter judgment in its favor and against plaintiffs, and for such other and further relief as the Court deems just and proper under the circumstances.

BROWN & JAMES, P.C.

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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was served via the Court's electronic filing system this 10th day of April, 2017, to the following:

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/s/ Robert L. Brady